Supreme Court, U.S.
FILED

071606 APR 14 2008

OFFICE OF THE CLERK
William K. Suter, Clerk

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2007

BRUCE ALLEN MARX
Petitioner

v.

THE STATE OF TEXAS

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF APPEALS FOR THE NINTH DISTRICT

BRUCE W. COBB
State Bar No. 04431900
3280 Delaware
Beaumont, Texas 77703
Phone: 409-899-3360
Fax: 409-899-3372

Counsel for Record for Petitioner

QUESTIONS PRESENTED

1. Whether the trial court's denial of continuance violated Petitioner's rights to choice of counsel and jury trial in violation of the Sixth and Fourteenth Amendments to the Constitution.

2. Do the rights to choice of counsel and trial by jury necessitate a higher standard of appellate review than simple abuse of discretion?

3. Does the right to choice of counsel include the right to assistance at trial by more than one counsel if the Petitioner can so afford and if necessary to Petitioner's effective defense?

PARTIES TO THE PROCEEDING

The following constitutes a complete list of parties:

Petitioner: Bruce Allen Marx
Current resident of Montgomery County, Texas
and Appellant/Defendant in the Courts below.

Respondent: The State of Texas

TABLE OF CONTENTS

	Page
Questions presented	i.
List of Parties	ii.
Table of Contents	iii.-viii.
Table of Authorities	vi.-viii.
Opinions Below	1
Jurisdiction	1
Constitutional Provisions Involved	2
Statement of the Case	3
Reasons for Granting Petition	6
I. This case raises important Federal Constitutional Questions of a recurring nature.	6
II. The Texas Court of Appeals decision undermines this Court's recent decision in United States v. Gonzalez-Lopez 548 U.S. 140 (2006) and conflicts with this Court's holding in Chandler v. Fretag 348 U.S. 3 (1954)	9

III. Various state courts of last resort the and the Federal Circuits disagree on the standards/factors when reviewing the issue on whether a trial court's action deprives an accused person of the choice of counsel and jury trial. 12

a. The rights of choice of counsel and to trial by jury are fundamental and their waiver should never be presumed. 12

b. The standard of review should reflect consideration of undamental constitutional rights. 14

IV. The Texas Courts so far have wrongfully deprived Petitioner of his rights of choice of counsel and trial by jury. 15

CONCLUSION 16

APPENDIX iv.,v.

Supreme Court letter A-1-2

Texas Court of Criminal Appeals denying review A-3

Texas Court of Appeals Opinion and Judgment A-5-16

Order denying Application for Habeas Corpus	A-17
Findings of Fact/Conclusion of Law	A-18-20
Application for Habeas Corpus	A-21-29
Prior Court of Appeals Opinion	A-30-46
Appellant's Brief (Excerpts)	A-46-52
Affidavit in Support of Motion for New Trial (Lawrence)	A-52-71
Affidavit in Support of Motion for New Trial (Wood)	A72-74
Order denying Motion for Continuance	A-75
Motion for Continuance Due to Medical Emergency with attachments	A-76-84

TABLE OF AUTHORITIES

CASES:	PAGE
Aetna Ins. Co. v. Kennedy, 301 U.S. 389 (1937)	12
Bose Corp v. Consumers Union of United States, Inc., 466 U.S. 485 (1984)	14
Bullington v. Missouri 451 U.S. 430 (1981)	11
Chandler v. Fretag 348 U.S. 3 (1954),	9,10,11
Duncan v. Louisiana, 391 U.S. 145 (1968)	12
Ex parte Windham, 634 S.W. 2d 718 (Tex. Crim. App. 1982)	12
Giacalone v. Lucas 445 F. 2d 1238 (6th Cir. 1971)	13
Gonzales v. State 117 S.W. 3d 831 (Tex. Crim. app. 2003)	5,7,8,9,10,12,13
Hudson v. Louisiana, 450 U.S. 40 (1981)	11
Jackson v. State, 115 S.W. 262 (Tex. Crim. App. 1908)	6
Jenschke v. State, 147 S.W.3d 398 (Tex. Crim. App. 2004)	3

Lilly v. Virginia, 527 U.S. 116 (1999) 9

London v. Commonwealth, 49 Va. App. 230, 638 S.E. 2d 721 (2006) rev. den. by Va. Sup. Ct. (2007) 7,8,12

Morris v. Slappy, 461 U.S. 1 (1983) 11,15

Oregon v. Kennedy, 456 U.S. 667 (1982) 9

People v. Bingham, 364 Ill. App. 3d 642, 847 N.E. 2d 903 (2006) 7,8,12

People v. Knowles, 88 N.Y. 2nd 902, 650 N.E. 2d 617 (N.Y. Ct. App. 1996) 7,8

Powell v. Alabama, 287 U.S. 45 (1932) 12

Ungar v. Sarafite, 376 U.S. 575 (1964) 17,19

United States v. Gonzales-Lopez 548 U.S. 140; 126 S.Ct. 2557, 2565-66 (2006) 8,9,11,14,15,1

United States v. McManaman, 653 F.2d 458, 460 (10th Cir. 1981) 13

United States v. Rankin 779 F.2d 956 (3rd Cir. 1986) 13

United States v. Riccobene, 709 F. 2d 214 (3rd Cir. 1983) 15

United States v. Robertson, 45 F. 3d 1423 (10th Cir. 1995) cert. den. 516 U.S. 844 15

United States v. Santos, 201 F. 3d 953 (7th Cir. 2000) 13

Westbrook v. Arizona, 384 U.S. 150 (1966) 14

Wheat v. United States, 486 U.S. 153 (1988) 12

CONSTITUTIONAL PROVISIONS:

U. S. Const. Amend. VI 1,6,7

U. S. Const. Amend XIV (Section 1) 2

OTHER AUTHORITIES:

Article 11.072 of the Texas Code of Criminal Procedure 2

Stern & Gressman, et al,Supreme Court Practice (8th ed. 2002) 9

Texas Human Resources Code Section 36.004 4,5

OPINIONS BELOW

The decision of the Court of Appeals is not reported. The Order of the Court of Criminal Appeals is not reported either as is a related previous Court of Appeals' decision of the merits. However, all of these items are contained in the Appendix. See Appendix Apps. A-1 through A10

JURISDICTION

This Court has jurisdiction over this case under 28 U.S. Code Section 1257(a). The Court of Appeals decision was handed down on July 12, 2007. Petitioner timely sought review from the Court of Criminal Appeals of Texas. That Court denied review on November 14, 2007. Petitioner applied for an extension and was granted an extension by Justice Scalia until April 14, 2008. (A-1)

CONSTITUTIONAL PROVISIONS INVOLVED

U. S. Const. Amend. VI provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U. S. Const. Amend XIV (Section 1) provides:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Procedural History

Petitioner was defendant in the trial court below (252nd Judicial District, Jefferson County, Texas). The instant case involves an appeal of a denial of a writ of habeas corpus under Article 11.072 of the Texas Code of Criminal Procedure. The trial court after a bench trial convicted Petitioner of the offense of burglary and sentenced Petitioner to five (5) years of community supervision. Petitioner appealed to the Texas Court of Appeals, which affirmed his conviction (Marx I). The Court of Criminal Appeals of Texas denied review and a motion for rehearing. No review by Certiorari was sought in this Court. Later, Petitioner applied for a writ of habeas corpus under Article 11.072 because he was on a community supervision rather than imprisonment. The trial court denied the writ. Petitioner again appealed to the Court of Appeals (Marx II). The Texas Court of Criminal Appeals

denied review. Petitioner seeks a writ of certiorari from this Court.

B. Statement of Facts

Petitioner Bruce Marx stood charged with the felony crime of burglary of a building. Marx was a physician assistant for a Beaumont, Texas doctor and was given a key to the premises. Marx was fired and some dispute in the record over the circumstances of when and why Marx was fired. Yet, Marx retained a key to the building. Marx entered the building, copied his own patient's notes and records and mailed them to the Medicaid Control Unit and Texas Board of Medical Examiners (R.R. Vol. 4, p. 62). Petitioner testified that this reason was the one why he allegedly burglarized the doctor's office. (R.R. Vol. 4, pp. 66-68) Petitioner relied on the statutory immunity from criminal liability for reporting Medicaid fraud. Texas Human Resources Code, Section 36.004. At that time, Texas law held that a person who is not a law enforcement officer takes property that is evidence of a crime and turns it over to a law enforcement officer or acts with such intent to turn it over to law authorities, such conduct may be non-criminal even though it was without the consent of the owner. See Jenschke v. State, 147 S.W.3d 398, 402 (Tex. Crim. App. 2004). Marx sought to use these justifications as a defense. Prior to trial in 2002, Marx retained a co-counsel for jury trial, a Mr. Wood who was more experienced in jury trials than Mr. Lawrence, Marx's current counsel. (App. A-55) Marx's defense team announced ready in the Fall of 2002, but the case was reset. The case was set for trial in March 31,

2003. About one week prior to trial, Mr. Wood found out that he had to undergo emergency cancer surgery. Mr. Lawrence moved for a continuance explaining the reasons. (App. A-76) A copy of this Motion and the Order denying the same is made part of the Appendix. (App. A-75,76) The trial court denied the continuance. (App. A-75) Mr. Lawrence told the trial court that he had no first chair experience with jury trials and felt not competent to handle a jury trial. Therefore, Mr. Lawrence brought in Mr. Wood who does jury trials. Mr. Lawrence felt that the case had a lot of complex issues (Marx's actions as a "whistleblower"). Marx had paid Mr. Wood $2,000 as a retainer to try the case. Mr. Lawrence told the trial court that Marx had a Sixth Amendment right to counsel of choice where retained and that Mr. Wood still wanted to try the case after Mr. Wood recovered from emergency surgery. The trial court still stood by his overruling the Motion for Continuance. (App. A-57) Stunned by the ruling, Mr. Lawrence suggested Mr. Marx waive his right to a jury trial. Marx still wanted a jury trial. (App. A-57) Marx reluctantly waived a jury and did so under duress even though advised by counsel. (App. A-23,24) Lawrence did not believe that Marx would have waived a jury trial except for the circumstances. (App. A-57) Marx waived the jury trial in writing, but without any colloquy in the record admonishing Marx on his jury waiver.

During the bench trial, the trial court did not allow Lawrence to present evidence on his immunity defense despite the fact that the preceding trial judge, Judge Giblin made very clear that the issue of immunity in the Texas Human Resources Code

Section 36.004 would be for the jury to decide. (App. A-63) The entire time of the trial, Mr. Lawrence was frequently cut off while speaking by the trial court and was not allowed to present various witnesses or documents. (App.A-64,69) At the conclusion of the trial, the trial court found Marx guilty and sentenced Marx to five (5) years community supervision. Marx moved for a new trial, which contained Mr. Lawrence's lengthy affidavit (App. A-53-71) On appeal, Marx argued among other things that he was deprived of his choice of counsel and jury trial (even though this issue was cast as ineffective assistance of counsel) App.A-51) The Texas Court of Appeals affirmed the conviction with written opinion (Marx I) (App. A-30-46) The Texas Court of Criminal Appeals denied review.

After this first appeal, this Court decided the case of United States v. Gonzalez-Lopez, 548 U.S. 140 (2006) which involved the right to choice of counsel. Marx applied for a Writ of Habeas Corpus urging that he was "denied his right of jury trial and counsel of choice in violation of the Sixth and Fourteenth Amendments" to the Constitution. (App.A-22) The trial denied the application and made findings. (App. A-17,18-20) The Texas Court of Appeals affirmed the denial (Marx II) The Court of Appeals held that the Gonzalez-Lopez decision did not apply to the facts of the case. First, error was not conceded by the state. The Court of Appeals held there was no abuse of discretion on the part of the trial court, hence, Marx's rights of choice of counsel and jury trial were not violated. (App.A-13,14) The Texas Court of Criminal Appeals denied review. (App.A-2)

REASONS FOR GRANTING THE PETITION

I. This case raises important Federal Constitutional questions of a recurring nature.

Petitioner asserts that the Sixth Amendment right to choice of counsel does not limit a criminal defendant to "one lawyer per one defendant." U.S. Const. Amend. VI A criminal defendant who can afford to retain such additional counsel as should be necessary for his defense. A venerable old decision by the Texas Court of Criminal Appeals stated as early as 1908:

> "Our Bill of Rights guarantees that when the accused is placed upon his trial, he shall have the right to be heard by his counsel and himself, either or both. The defense of an accused by counsel is a very valuable right and one which is guaranteed by our Constitution and laws, ...
> ...*The fact that appellant may have been ably defended by other `counsel does not abridge his right to have counsel of his own selection, and as many as he may see proper to employ, to defend him; ...*"

Jackson v. State, 115 S.W. 262, 264 (Tex. Crim. App. 1908) (emphasis added)

Yet, the Texas Court of Appeals in their opinion seized upon the State of Texas' "additional counsel" argument, which led it to the conclusion that the trial court did not deprive Marx of his choice

of counsel. (App.A-13-14) The Court of Appeals decisions raises important questions of Federal Constitutional law, which may yet reoccur.

Since this Court's decision in United States v. Gonzalez-Lopez, at least two appellate decisions from different states (Illinois) and (Virginia) have applied Gonzalez-Lopez in the context of a denial of a motion for continuance. See People v. Bingham, 364 Ill. App. 3d 642, 847 N.E. 2d 903, 907 (2006) and London v. Commonwealth, 49 Va. App. 230, 638 S.E. 2d 721 (2006) rev. den. by Va. Sup. Ct. Unlike the Texas Court of Appeals both the Illinois and Virginia appellate courts held that the trial court abused its discretion.

The Sixth Amendment to the United States Constitution provides that: "[i]n all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defense." U.S. Const. Amend. VI. The State says that Marx's "right" was for "additional counsel." However, the Sixth Amendment does not limit a criminal defendant "to one lawyer per one defendant." A defendant can hire one lawyer or a whole team of lawyers. O.J. Simpson had several lawyers at one time defending him. Marx was entitled to be defended by whatever he could afford. Marx was deprived of his "jury trial lawyer" through no fault of his own.

As for as multiple attorneys assisting a defendant, the complete exclusion of a second attorney at counsel table was held to be an abuse of discretion requiring reversal and a new trial. See People v. Knowles, 88 N.Y. 2nd 902, 650 N.E. 2d 617 (N.Y. Ct. App. 1996) The New York Court of Appeals (highest appeal court in that state) held that the

trial court interfered with the defense by excluding co-counsel from the trial. No record evidence showed that co-counsel's participation would have disrupted the efficient conduct of trial or resulted in prejudice to the prosecution of defense. The Court of Appeals stated:

> "Accordingly in this case, we hold simply that in exercising its discretion to manage the courtroom, the (trial) court's interference with the defendant's established relationship with counsel must be justified by overriding concerns of fairness or efficiency - - regardless of whether counsel is assigned or retained and regardless of whether defendant is represented by more than one attorney."

This Court has not decided the issue of whether Sixth Amendment limits or allows the representation of multiple counsel. This issue constitutes an important one, which this Court should review.

The existence of the Bingham, London and Knowles cases from different jurisdictions demonstrate that these very issues will recur in the future. This Court should grant certiorari to provide further guidance the state courts and the Federal Circuits.

II. The Texas Court of Appeals decision undermines United States v. Gonzalez-Lopez

and conflicts with this Court's holding in Chandler v. Fretag.

The Texas Court of Appeals has decided at least one substantial Federal Constitutional question in an erroneous or at least doubtful manner. Where a state court has decided a substantial and unsettled federal question arising under the Constitution or at a doubtful decision on such a question, this Court has granted certiorari despite the absence of a conflict. See e.g. Lilly v. Virginia, 527 U.S. 116, 123 (1999) (state court decision represented a significant departure from our Confrontation Clause jurisprudence); Oregon v. Kennedy, 456 U.S. 667, 668-669 (1982) (state court took an "overly expansive view of the Double Jeopardy Clause") Stern & Gressman, et al. Supreme Court Practice (8th ed. 2002) pp. 272-273. The Texas Court of Appeals took an overly narrow view of the Sixth Amendment rights to counsel of choice and jury trial.

This Court in Gonzalez-Lopez 548 U.S. 140 (2006) noted that the Sixth Amendment is violated when the erroneous disqualification of counsel "impair[s] the assistance that a defendant receives at trial [from the counsel that he chose]." This Court also stated further:

> "Deprivation of the right is 'complete' when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received."

Gonzalez-Lopez 548 U.S.140;126 S.Ct. 2565-66

Marx understands that Gonzalez-Lopez involved an attorney disqualification and that a trial court has wide latitude in balancing the right to counsel of choice against the needs of fairness and demands of its calendar. See Gonzalez-Lopez 548 U.S. 140; 126 S.Ct. 2557, 2565-66. The Texas Court of appeals used this rationale to dismiss Marx's arguments. Even though these rights must be balanced against a trial court's needs, these rights while not absolute, are fundamental. A rigid insistence on expedition in the face of a justifiable request for delay can amount to a constitutional violation. The answer must be found in the circumstances present in the particular case. Ungar v. Sarafite, 376 U.S. 575, 589 (1964) The circumstances cited by the Texas Court of Appeals were not sufficient to justify the trial court's decision: "four motions for continuance, eight re-settings and a retained counsel who had been on the case from the outset." (App. A-12) None of the four continuances were ever granted; two were outright denied. The eight re-settings were for the trial court's benefit. The retained trial counsel was inexperienced in jury trials and was not well-prepared to try this case.

In Chandler v. Fretag 348 U.S. 3 (1954), this Court held that denial of continuance to permit an accused to retain qualified counsel

to assist in his defense was error. This Court further held that the defendant's "right to be heard through his own counsel was unqualified." 348 U.S. at 9. Since Marx was denied his jury trial counsel, Mr. Woods whom Mr. Lawrence needed Woods' assistance to adequately try this case, Marx's rights to choice of counsel and to jury trial were violated. While the facts differ in Chandler from the facts in this case, sufficient operative facts exist to make Chandler at least inconsistent with that of the Texas Court of Appeals on a matter of federal law. That circumstance presents a strong reason for granting certiorari. See e.g. Hudson v. Louisiana, 450 U.S. 40, 42 (1981) Certiorari also has been granted to determine whether a state court has properly interpreted, applied or extended a prior Supreme Court decision in a given situation. See e.g. Bullington v. Missouri 451 U.S. 430, 432 (1981) (certiorari granted on issue of whether prior Court precedent also applies to a different kind of sentencing procedure). Besides Chandler, this Court has also granted review on the issue of whether denial of choice of counsel has been violated by denial of a motion for continuance. See e.g. Morris v. Slappy, 461 U.S. 1 (1983); Ungar v. Sarafite, 376 U.S. 575 (1964). This Court should take the occasion to harmonize its prior decisions.

III. Various state courts of last resort and the Federal Circuits disagree on the standard/factors when reviewing the

issue of whether a trial court's action deprives an accused person of the rights of choice of counsel and jury trial.

a. the rights of choice of counsel and to trial by jury are fundamental and should receive the benefit of their presumptions.

The grant of jury trial for serious offenses is a fundamental right, essential for preventing miscarriages of justice, and for assuring that fair trials are provided for all defendants. Duncan v. Louisiana, 391 U.S. 145, 158-159 (1968) Because the right to jury trial is fundamental, a presumption exists against its waiver. See Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937) Likewise, the right to choice of counsel should be deemed fundamental. Powell v. Alabama, 287 U.S. 45, 53 (1932); Wheat v. United States, 486 U.S. 153, 161-162.

The essential difference between the Texas Court of Appeals opinion and the London and Bingham decisions is that the Virginia and Illinois appellate courts applied a close scrutiny analysis rather than a simple abuse of discretion standard as did the Texas Court. The Texas Court relied upon Gonzalez v. State 117 S.W. 3d 831 (Tex. Crim. app. 2003) and Ex parte Windham, 634 S.W. 2d 718 (Tex. Crim. App. 1982) The Texas Court of Criminal Appeals in Windham adopted a multifactor test in determining whether a

defendant was erroneously deprived of counsel of his choice through denial of a motion for continuance 634 S.W.2d at 720. After this Court's decision in Gonzalez-Lopez, several of these factors, e.g. whether another competent attorney prepared to try the case, quality of legal representation, whether harm resulted, were rendered immaterial. Id. Nevertheless the Texas Courts still apply a simple abuse of discretion test. Id.

The Federal Circuit Courts of Appeal apply a deferential standard; but scrutinize the circumstances and reasons given by the trial court for its ruling. See e.g. United States v. Santos, 201 F. 3d 953, 958-959 (7th Cir. 2000) (denial of continuance reversed) This approach appears to balance the right to choice of counsel with the trial court's needs for efficient administration. The Federal Circuits are not uniform when additional counsel is sought, some federal courts have found no abuse of discretion in the denial of a requested continuance when the defendant was otherwise represented by qualified and competent counsel. See e.g. United States v. Riccobene, 709 F. 2d 214, 231 (3rd Cir. 1983); United States v. McManaman, 653 F.2d 458, 460 (10th Cir. 1981); Giacalone v. Lucas 445 F. 2d 1238, 1243 (6th Cir. 1971) Contrast with United States v. Rankin 779 F.2d 956 (3rd Cir. 1986) (trial court's arbitrary action reversed) However, deducing the rights of choice of counsel and jury trial to a simple abuse of discretion test belittles these rights. These

interests deserve more protection. The presumptions protecting these rights would be rendered meaningless if the current standards of appellate review remain. Every limitation or incidental burden on the exercise of the right of jury trial is subject to a stringent standard of review. Westbrook v. Arizona, 384 U.S. 150 (1966) A stringent standard of review should be adopted rather than a simple abuse of discretion.

b. the standard of review should reflect consideration of fundamental Constitutional rights.

In Wheat v. United States, 486 U.S. 153, 165-169 (1988), Justices Marshall and Brennan dissented to the majority's holding and suggested that the Court change its standard of review to allow an appellate court to "scrutinize closely" the basis for the trial court's decision. Only in this way can a defendant's right to counsel of his choice be appropriately protected. 486 U.S. at 168.

This Court in Wheat recognized that this right to choice of counsel mandates a presumption in favor of accepting a criminal defendant's choice of counsel. 486 U.S. at 161-162. "When the standard governing the decision of a particular case is provided by the Constitution," close appellate scrutiny is particularly important. See Bose Corp v. Consumers Union of United States, Inc., 466

U.S. 485 502-503 (1984). Wheat, 486 U.S. at 168 (Marshall dissenting) Petitioner submits that a standard should approach review as a question of law.

IV. The Texas Courts so far have wrongfully deprived Petitioner of his rights of choice of counsel and trial by jury.

The trial court's actions not deprived Marx of his counsel of choice and jury trial. The record evidence does not support the trial court's actions. Marx's jury trial counsel fell to an unexpected medical emergency beyond Marx's control. Unlike Morris v. Slappy, Marx had no control over his circumstances. The affidavits of Mr. Lawrence and Mr. Wood are the only account of what happened with respect to the trial court's ruling. No colloquy was had. The state presented no evidence of what the trial court's state of the docket, the inconvenience of the witnesses, etc. Only speculation and unfounded assumptions support these factors. Waiver of Constitutional rights should not be presumed. See United States v. Robertson, 45 F. 3d 1423 (10th Cir. 1995) cert. den. 516 U.S. 844 (no evidence that defendant intelligently or voluntarily waived a jury trial.) Contrast the Robertson decision with the first Court of Appeals decision. (Marx I) (App. A-30) The Texas Courts have so far deprived Petitioner of his rights under the Constitution. This

Court should reverse this case to stop continuing injustice.

CONCLUSION

Petitioner, BRUCE ALLEN MARX prays that this Court grant his Petition.

Respectfully submitted,

Bruce W. Cobb
Texas Bar No. 04431900
Craig J. Schexnaider
Texas Bar No. 00797385
3280 Delaware
Beaumont, Texas 77703
Phone: 409-899-3360
Fax: 409-899-3372
COUNSEL FOR PETITIONER

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Mr, Bruce W. Cobb
3280 Delaware
Beaumont, TX 77703
February 20, 2008
William K. Suter Clerk of the Court (202) 479-3011
Re: Bruce Allen Marx v. Texas
Application No. 07A689
Dear Mr. Cobb:
The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Scalia, who on February 20, 2008 extended the time to and including April 14, 2008.
This letter has been sent to those designated on the attached notification list.
Sincerely, William K. Suter, Clerk
by Gail Johnson, Case Analyst

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS
02 1M
0004236449 NOV 16 2007
MAILED FROM ZIP CODE 78 701
On this day, the Appellant's petition for discretionary review has been refused.
Louise Pearson, Clerk
252ND DISTRICT COURT
PRESIDING JUDGE
1001 PEARL ST
BEAUMONT TX 77704-3707
P.O. BOX 12308
CAPITOL STATION, AUSTIN,
TEXAS 78711
Wednesday, November 14. 2007
Re: Case No. PD-388-07

COA#: 09-06-40535-CR
STYLE: MARX, EX PARTE BRUCE
COURT OF APPEALS
NINTH DISTRICT OF THE STATE OF TEXAS
1001 Pearl, Suite 330
Beaumont, Texas 77701
Judgment entered July 11, 2007
No. 09-06-00535-CR
Ex Parte Bruce Marx
Appealed from the 252nd District Court, Jefferson County,
Texas Opinion by Justice David Gaultney
This cause was heard on the record of the Court below and the same being considered, it is the opinion of this Court that there was no error in the trial court's order. It is therefore ordered that the trial court's order denying habeas corpus relief be in all things AFFIRMED. A copy of this judgment shall be certified below for observance.
Carol Anne Flores Clerk of Court

In The
Court of Appeals
Ninth District of Texas at Beaumont
NO. 09-06-535 CR
EX PARTE BRUCE MARX
On Appeal from the 252nd District Court
Jefferson County, Texas
Trial Cause No. 84732-A

MEMORANDUM OPINION

Bruce Marx was convicted in a non jury trial of burglary of a building. The trial court sentenced him to two years in the state j ail and probated his sentence. *See Marx v. State, No.* 09-03-23 5 CR, 2004 WL 2955270, at * 1(Tex. App.-- Beaumont Dec. 22, 2004, pet. ref). On appeal, this Court affirmed his conviction. *Id.* at *5. The Court of Criminal Appeals denied his petition for discretionary review. Pursuant to article 11.072 of the Texas Code of Criminal Procedure, Marx filed an application for writ of habeas corpus with the trial court,which denied the application. *See* TEX. CODE CRIM. PROC. ANN. art. 11.072 (Vernon 2005).

Raising five issues, Marx appeals to this Court. Marx retained attorney Jack Lawrence to represent him in connection with the burglary charge, and Lawrence remained as counsel through trial. By affidavit attached to the habeas corpus petition, attorney Lawrence stated, "I felt that I was not qualified to handle this felony trial before a jury because I did not have sufficient jury trial experience." Lawrence then brought in Robert Wood, an attorney "who I knew to possess adequate jury experience to handle the jury trial." In his affidavit, Lawrence stated he "was to assist [Wood] and handle all of the legal arguments during trial." According to the affidavit, Wood was retained approximately a year before trial. We noted in our opinion in the direct appeal that counsel had made his appearance in the case a month before the motion for continuance was filed. *See Marx,* 2004 WL 2955270, at 4. Lawrence stated in his affidavit that approximately "one week before trial, Mr. Wood found out that he had to undergo

immediate surgery for cancer[,]" a "circumstance [that] was totally unexpected and not anticipated." Lawrence filed a fourth motion for continuance, which the trial court denied. Lawrence then "advised Mr. Marx to waive his right to jury trial." Marx did so, and the case was tried to the trial court ruled on the merits of the habeas corpus application. We have jurisdiction over the appeal. *See Ex parte Hargett, 819* S.W.2d *866, 868* (Tex. Crim. App. 1991).

Wood's affidavit, attached to Marx's application for writ of habeas corpus, attests to similar facts regarding Wood's medical condition at the time the case was set for trial.

An applicant for a writ of habeas corpus has the burden of proving his allegations by a preponderance of the evidence. *Ex parte Thomas, 906* S.W.2d 22, 24 (Tex. Crim. App. *1995). In* reviewing a trial court's decision on a habeas corpus application, an appellate court reviews the facts in the light most favorable to

the trial court's ruling and, absent an abuse of discretion, upholds the ruling. *See Ex parte Peterson,* 117 S.W.3d 804, 819 (Tex. Crim. App. 2003), overruled on other grounds by *Ex parte Lewis,* 219 S.W.3d 335 (Tex. Crim. App~ 2007). We give almost total deference to a trial court's determination of historical facts especially when the findings are based on an evaluation of credibility and demeanor. *Peterson,* 117 S.W.3d at *819.* We afford the same deference to the trial court's application of the law to the facts, if the resolution of the ultimate questions turns on an evaluation of credibility and demeanor. *Id.* If the resolution of the ultimate questions turns on an application of legal standards, we review the determination *de novo. Id.*

In issues one through three, Marx argues the trial court violated his Sixth Amendment right to choose his own counsel. The right to select counsel of one's choice is considered the core meaning of the Sixth Amendment's guarantee of right to counsel. *See United States v.*

Gonzalez-Lopez, 74 U.S.L.W. 4453 (2006). 126 S.Ct. 2557, 2563, 165 L.Ed.2d 409. A trial court's erroneous deprivation of this right is structural error and not subject to harmless-error analysis. *Id.,* 126 S.Ct. at 2564, *2566.* The error requires automatic reversal on appeal. *Id.* Relying on *Gonzalez-Lopez,* Marx argues the trial court's denial of the motion for continuance effectively deprived him of his right to choose his own counsel. *Id.* This case is distinguishable from *Gonzalez-Lopez.* There, the defendant's family hired a local attorney to represent him. *Id.* at 2560-61. After arraignment, the defendant contacted an out-of-state attorney concerning representation. *Id.* at 2560. Ultimately, the defendant decided to retain only the out-of-state counsel, who filed for admission *pro hac vice. Id.* The district court twice denied the attorney's application, because the attorney allegedly violated the rules of professional conduct by communicating with a represented party. *Id.* at 2560-61. The State conceded the trial court

erroneously deprived the defendant of the right to choose his own counsel. *Id.* at 2561. Expressly noting the State's concession of error, and "[a]ccepting that premise," the Supreme Court held that the district court violated the defendant's Sixth Amendment right to counsel of choice, and found the error "not subject to harmless-error analysis." *Id.* at 2566.

Here, the trial court did not deprive Marx of his right to choose his own counsel. The issue is whether he was entitled to additional counsel despite the impending trial setting and the unavailability of that additional counsel. The State does not concede error by the trial court. The indictment date was August 16, 2001. Lawrence was the retained counsel from the outset of the case. He stated he brought in attorney Wood "of counsel" to handle the jury aspect of the trial, while Lawrence would assist in "all of the legal arguments during trial." The record in the underlying case reflects Lawrence's pretrial handling of the case through multiple pretrial motions and briefs to

the court. The record also reflects Marx filed four motions for continuance. The trial court denied two of them; we find no rulings on the other two. From September 13, 2001, through March 6, 2003, the trial court reset the case nine times; most of the resettings appear to be related to court administration. Appellant filed the fourth continuance motion in March 2003, and trial began at the end of March 2003.

When a defendant is tried without the assistance of counsel after the denial of a motion for continuance, courts have consistently found abuse of discretion. *State v. Doyle,* 140 S.W.3d 890, 894 (Tex. App.--Corpus Christi 2004, pet. ref d). That circumstance is not present here. Although the "of counsel" attorney in this case had a medical emergency shortly before trial, the chosen lead counsel continued on the case.

The right to counsel of one's choice is neither unqualified nor absolute. *See Gonzalez v. State,* 117 S.W.3d 831, 837 (Tex. Crim. App. 2003) (citing *Wheat v.*

United States, 486 U.S. 153, 159, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988)). In *Gonzalez-Lopez,* the Supreme Court stated as follows:

Nothing we have said today casts any doubt or places any qualification upon our previous holdings that limit the right to counsel of choice.... We have recognized a trial court's wide latitude in balancing the right to counsel of choice against the needs of fairness, and against the demands of its calendar[.] ... This is not a case about a court's power to enforce rules or adhere to practices that determine which attorneys may appear before it, or to make scheduling and other decisions that effectively exclude a defendant's first choice of counsel.

Gonzalez-Lopez, 126 S.Ct. at 2565-66 (internal citations omitted). Here, the trial judge had before him a case with four motions for continuance, eight re-settings, and a retained counsel who had been on the case from the outset and who had represented the defendant with extensive motions and briefs to the court.

As we noted in our prior opinion, the additional counsel filed his appearance a month before the fourth motion for continuance was filed. We do not question the unexpected nature of the illness. Nevertheless, the right to additional counsel of one's choice must be balanced with the trial court's need for prompt, orderly, effective, and efficient administration of justice. *Gonzalez,* 117 S.W.3d at 837; *Rosales v. State,* 841 S.W.2d 368, 374 (Tex. Crim. App. 1992); *Ex parte Windham,* 634 S.W.2d 718, 720 (Tex. Crim. App. 1982). In *Gonzales-Lopez,* after stating that "[n]othing we have said today casts any doubt or places any qualification upon our previous holdings that limit the right to counsel of choice ...," the Court cited among other limits a trial court's wide latitude in balancing the right against the needs of fairness and the demands of the court's calendar. *See Gonzales-Lopez,* 126 S.Ct. at 2565-66. Given the circumstances presented, the trial court did not commit error in proceeding to trial without the

additional counsel.[2]

'Marx argues the trial court's denial of his right of choice of counsel caused him to involuntarily waive his right to trial by jury. Since we find no error, Marx's argument regarding a causal connection between the alleged error, the waiver of jury trial, and the resulting harm has no merit. In any event, in our prior opinion we concluded in response to. In issue four, Marx contends the trial court erred in denying his habeas corpus application because the evidence was insufficient to prove his guilt. On direct appeal, we previously found the evidence in this case sufficient to support the conviction. *See Marx,* 2004 WL 2955270, at *1-4. Generally, a challenge to the sufficiency of the evidence is not cognizable on an application for a post-conviction writ of habeas corpus, unless the record is devoid of evidentiary support for a conviction. *Ex parte Perales, 215* S.W.3d 418, 420 (Tex. Crim. App. 2007). Here, the record contained ample evidentiary support for the conviction, as outlined in

our prior opinion. Marx offered no newly discovered or newly available evidence, and there is no error rendering Marx's conviction constitutionally invalid. *See Ex parte Brown,* 205 S.W.3d 538, 545 (Tex. Crim. App. 2006).

In issue five, Marx argues the trial court erred in refusing to allow his trial counsel to cross-examine the complaining witness concerning the witness's alleged false statements. Marx concedes he did not raise the issue on direct appeal. Article 11.072 provides that an "application may not be filed under this article if the applicant could obtain the requested relief by means of an appeal under Article 44.02 and Rule 25.2, Texas Rules of Appellate Procedure." TEX. CODE CUM. PROC. ANN. art. 11.072 § 3(a) (Vernon 2005). This is an issue that could have been raised on direct appeal. Marx presents no exception that would entitle Marx's ineffective assistance of counsel claim that his waiver of jury trial was voluntary. *See Marx,* 2004 WL 2955270, at 4.

For him to raise it for the first time by habeas corpus. *See Ex parte Townsend, 137 S.W.3d 79, 81* (Tex. Crim. App. 2004); *Exparte Gardner, 959* S.W.2d *189,199* (Tex. Crim. App. 1996) (op. on reh'g).

We affiim the trial court's order denying habeas corpus relief. AFFIRMED.

DAVID GAULTNEY Justice

Submitted on May 24, 2007 Opinion Delivered July 11, 2007

Do Not Publish

Before Gaultney, Kreger, and Horton, JJ.

WRIT NO. 84732-A

EX PARTE
BRUCE ALLEN MARX
IN THE DISTRICT COURT OF
JEFFERSON COUNTY, TEXAS
252ND JUDICIAL DISTRICT

ORDER

Came on to be heard this 31st day of October 2006, the Application of Bruce Marx. The Court having made written findings of fact and conclusions of law on the 31st day of October 2006, reaffirms the same. These findings and conclusions are attached herein as Exhibit "A" and are incorporated by reference.

All relief requested in said Application is DENIED.

SIGNED this 9th day of January 2007 .

WRIT NO. 84732-A
EX PARTE BRUCE MARX
IN THE 252nd DISTRICT COURT
JEFFERSON COUNTY, TEXAS

FINDINGS OF FACT
CONCLUSIONS OF LAW
HISTORY OF CASE

Petitioner was convicted in this court in cause no. 84732 of the offense of burglary of a building and punishment was assessed at two (2) years in the Institutional Division of the Texas Department of Criminal Justice probated over five years. Petitioner appealed the conviction that was affirmed by the Ninth Court of Appeals in opinion no. 09-03-00235-CR, delivered October 22, 2004. On October 6, 2006, the court received and filed petitioner's application for writ of habeas corpus.

PETITIONER'S ALLEGATIONS

Alleges Applicant was denied his right of a jury trial and counsel of choice for the jury trial in violation of the Sixth and Fourteenth Amendments to the United States Constitution.

2. Alleges the evidence was insufficient to prove Applicant's guilt beyond a reasonable doubt for the offense of burglary.

3. Alleges the trial court refused to allow Applicant's trial counsel to cross-examine the main complaining witness concerning prior false statements this witness made in Medicare documents which violated his rights.

STATE'S REPLY

The State, in accordance with Art. 11.07, V.A.C.C.P., was served with a copy of the petition on 13"' day of October, and their answer was filed on October 30, 2006. All of the petitioner's contentions are denied by the State.

FINDINGS OF FACT

1. The petitioner has not stated sworn facts which, if true, would justify granting the relief sought. Accordingly, no fact alleged would substantiate the petition and entitle him to relief.
2. The Court adopts as findings of fact the documents filed in cause number 84732-A, the official court records of the challenged conviction, and the Respondent's Original Answer.

CONCLUSIONS OF LAW

It is respectfully recommended that relief sought by Petitioner be denied in part and granted in part without a hearing. The clerk is ordered to immediately file and docket the petition, and to forward the same with these findings, State's reply, all documents received by the Court from the Petitioner, copy of docket sheets, judgment and sentence, and indictment in cause no. 84732 to the Texas Court of Criminal Appeals.

The clerk is also directed to transmit a copy of this order to the District Attorney of Jefferson County and to the Petitioner.

ENTERED this the 31St day of October, 2006. Judge Presiding

CAUSE NO. WRIT NO. 84732-A
EX PARTE
BRUCE ALLEN MARX
IN THE DISTRICT COURT OF
JEFFERSON COUNTY, TEXAS
252ND JUDICIAL DISTRICT

APPLICATION FOR A WRIT OF HABEAS CORPUS SEEKING RELIEF FROM FINAL FELONY CONVICTION AND COMMUNITY SUPERVISION UNDER ARTICLE 11.072 TEX. C. CRIM. ROC.

BRUCE ALLEN MARX, Applicant, seeks a Writ of Habeas Corpus granting relief from final felony conviction and community supervision under Article 11.072 Texas Code of Criminal Procedure and shows:

1. Applicant was convicted after a non jury trial before this Court in cause

number 84732. Applicant was sentenced to two years state jail probated and placed on community supervision. Applicant appealed his conviction to the Beaumont Court of Appeals and Court of Criminal Appeals in cause numbers 09-03-00235CR and PD-0347-05 respectively. The Texas Court of Criminal Appeals made final disposition of this case on October 7, 2005.

2. Applicant submits that the conviction for which community supervision was imposed was legally invalid for the following reasons: (a) Ground One

Applicant was denied his right of jury trial and counsel of choice for the jury trial in violation of the Sixth and Fourteenth Amendments to the United States Constitution. Applicant hired the services of Mr. Robert Wood, attorney to conduct a jury trial since Mr. Jack Lawrence lacked criminal jury trial experience. Mr. Wood was hired by

Applicant months before the trial date. About one week prior to trial, Mr. Wood was stricken and had emergency surgery. Mr. Wood was incapacitated and unable to perform. Applicant moved for continuance which was denied by the district court. The trial court forced Applicant to proceed to trial without Mr. Wood. Under duress, Applicant reluctantly waived a jury trial and was convicted.

(b) Ground Two
The evidence was insufficient to prove Applicant's guilt beyond a reasonable doubt for the offense of burglary as Applicant as employee of complainant had implied consent to enter the building and was not rebutted by the state's proof.

(c) Ground Three
The trial court refused to allow Applicant's trial counsel to cross-examine the main complaining witness concerning prior false statements this witness made

in Medicare documents violating Applicant's rights under the Sixth and Fourteenth Amendments to the United States Constitution.

3. Applicant requests this Court to take judicial notice of the Clerk's Record and the Reporter's Record in cause number 09-03-002235CR and filed with the Beaumont Court of Appeals. Applicant attaches the *affidavits* of Robert Wood and Jack Lawrence. These items are incorporated herein by reference as if fully set forth at length.

WHEREFORE, Applicant BRUCE ALLEN MARX prays that the Court grant Applicant relief to which he may be entitled in this proceeding.

By:

Respectfully submitted, '

BRUCE W. COBB
State Bar No. 04431900
3280 Delaware Beaumont, Texas 77703
Phone: 409-899-3360
Fax: 409-899-3372

Attorney for Defendant Applicant

CERTIFICATE OF SERVICE

I certify that the foregoing Application for Writ of Habeas Corpus was served by United States Certified Mail, return receipt requested upon Mr. Rod Conerly, Chief Appellate Section, Jefferson County District Attorney, 1001 Pearl, 3rd Floor, Beaumont, Texas 77701 on this 6th day of October, 2006.

BRUCE W. COBB

STATE OF TEXAS
COUNTY OF JEFFERSON

BEFORE ME, the undersigned Notary Public appeared, BRUCE ALLEN MARX, being first duly sworn by me under oath says that he is the applicant in this action and knows the content of the above application and according to the applicant's belief, the foregoing allegations are true and correct.
BRUCE ALLEN MARX

SWORN AND SUBSCRIBED to before me the undersigned Notary Public day of October 2006.

STATE OF TEXAS §
COUNTY OF JEFFERSON §

BEFORE ME, the undersigned Notary Public appeared, JACK

LAWRENCE, who by me was duly sworn and states upon his oath as follows:

"My name is JACK LAWRENCE and I am a licensed attorney in the State of Texas and am otherwise qualified to make this statement. I was hired to defend one BRUCE MARX who was charged with the offense of burglary. I felt that I was not qualified to handle this felony trial before a jury because I did not have sufficient jury trial experience. I had contacted and brought in Mr. Robert Wood, an attorney practicing in Woodville, Texas who I knew to possess adequate jury experience to handle the jury trial. Mr. Wood had been retained to do the jury portion of trial about one year before the actual trial. I was to assist him and handle all of the legal arguments during trial. Mr. Wood was retained by separate payment from Mr. Marx. This case ultimately was set for trial in early 2003. About one week before trial, Mr. Wood found out that he had to undergo

immediate surgery for cancer. This circumstance was totally unexpected and not anticipated. I filed a Motion for Continuance which, was promptly denied, by the trial court. Then, upon being forced to proceed without Mr. Wood, I advised Mr. Marx to waive his right to jury trial. Mr. Marx did so and we proceeded to try his case non jury.

During the non jury trial, the district judge refused to allow evidence, which implicated the main complaining witness in Medicaid fraud and abuse and other potential criminal activity. Mr. Marx was in the process of obtaining records, almost all of which had been prepared by Mr. Marx himself in his own hand, indicating that the complaining witness ostensibly had committed the violations described above. This action formed the basis of the burglary charge against Mr. Marx. I believe that a jury, which had an opportunity to hear all of the admissible evidence capable of being offered by the defense, and, in my opinion, improperly

withheld or excluded, would have acquitted Mr. Marx. Also, due to the erroneous or faulty practice of ruling on defense pre-trial motions throughout the trial, despite timely motion for an Article 28.01 hearing at the beginning of trial, the court reporter failed to record much of the discussion, and in several cases, the actual rulings, on the defense pre-trial motions, which together with several large holes or gaps in the record of the testimony meant that the Court of Appeals and appellate counsel, only had a very incomplete record to proceed on, which gaps I have only begun to document.

JACK LAWRENCE

SWORN AND SUBSCRIBED to before me the undersigned Notary Public this 2nd day of October 2006.

Notary Public, State of Texas

KAREN S BUCKNER Texas Notary Public

My Commission Expires 11-15-2008

In The Court of Appeals

Ninth District of Texas at Beaumont
NO. 09-03-235 CR
BRUCE ALLEN MARX, Appellant
V.
THE STATE OF TEXAS, Appellee
On Appeal from the 252nd District Court
Jefferson County, Texas
Trial Court Cause No. 84,732

MEMORANDUM OPINION

Bruce Allen Marx was convicted of burglary of a building under section 30.02 of the *Texas Penal Code. See Tex. Penal Code Ann. § 30.02 (Vernon 2003).* The trial court sentenced Marx to two years of imprisonment in the state jail division of the Texas Department of Criminal Justice, which was suspended and probated for five years, and a $500.00 fine. In this appeal, Marx argues the evidence was legally and factually insufficient to support the conviction, he did not receive

effective assistance of counsel, and the trial court erred in failing to grant counsel's motion for continuance.

Sufficiency of the Evidence

In his first issue, Marx says the evidence is legally and factually insufficient to support the verdict. In reviewing an issue of legal sufficiency, an appellate court views the evidence in the light most favorable to the verdict to determine whether a rational fact finder could have found each element of the offense beyond a reasonable doubt. SE *Conner v. State, 67 S.W.3d 192, 197 (Tex. Crim. App. 2001) (citing Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)). When addressing issues of factual sufficiency, the appellate court asks whether, considering all of the evidence in a neutral light, the jury was rationally justified in finding guilt beyond a reasonable doubt. *See Zuniga v. State,* 144 S.W.3d 477, 484 (Tex. Crim. App.

2004). An appellate court "must give due deference to the fact finder's determinations concerning the weight and credibility of the evidence and will reverse the fact finder's determination only to arrest the occurrence of a manifest injustice." *Swearingen v. State,* 101 S.W.3d 89, 97 (Tex. Crim. App. 2003) (en banc). In a bench trial, the trial court, as the finder of fact, may resolve any conflicts in the evidence, evaluate the credibility of the witnesses, and determine the weight to be given any particular evidence. *See Wink/ey v. State,* 123 S.W.3d 707, 711(Tex. App.--Austin 2003, no pet.); *see* *also* *Cain v. State,* 958 S.W.2d 404, 408-409 (Tex. Crim. App. 1997); *see also Joseph v. State, 897* S.W.2d 374, 376 (Tex. Crim. App. 1995). The complainant testified he is a psychiatrist who practices in Beaumont, Texas. According to complainant, he hired Marx as a part-time physician assistant. Complainant stated he terminated Marx by telephone on May 14, 2001, because he received complaints about

Marx from patients. Complainant stated Marx's office privileges ceased on the date of termination. Complainant had a conversation with Marx on May 16, during which Marx stated he wanted complainant to continue paying him. Complainant testified Marx said, if complainant did not pay Marx, Marx would report complainant to the Board of Medical Examiners for billing fraud and failure to adequately supervise Marx. According to complainant, Marx told him he could prove his allegations because he had entered complainant's office on May 14, made copies of records, and took the copies home. Complainant stated Marx did not have permission to enter the office after hours on May 14. Marx told complainant he wanted "a bigger piece of the pie," and complainant felt Marx was threatening to blackmail him. Complainant stated he subsequently learned Marx had entered his office by using a key he had been given when he was hired.

Malana Rideaux, a colleague of Marx's from another job, testified Marx told her he intended to break into complainant's office to obtain records with which to blackmail complainant. Rideaux testified when she told Marx that entering complainant's office sounded illegal, Marx responded "I still have a key." Subsequently, Marx told Rideaux and another witness, Jo Lynn Bailey, that he had entered complainant's office and copied the medical records. Bailey testified she received a phone call from personnel in complainant's office, and the caller asked her to tell Marx his services were no longer required. Bailey stated she called Marx to the phone instead of relaying the message, and that Marx later told her complainant had fired him. Bailey stated Marx also told her he hoped to meet with complainant soon to get his job back.

Myra Gothe, an employee of the cleaning service employed to clean complainant's

offices, stated she saw a note to her from Marx saying "Myra, would you come by the office -- Bruce." Gothe stated she was aware defendant had worked at complainant's office. Gothe testified that, when she entered the lobby, she saw Marx heading toward her. When he reached her, he asked whether complainant came to the office after hours, and she responded that he sometimes did. Upon entering complainant's office after hours, Gothe saw Marx and his fiancee in complainant's office, and it appeared they were copying medical records.

Complainant's office manager, Karen Jones, testified that she was present when complainant terminated Marx by telephone on May 14, 2001. Jones also stated complainant called her into his office during the post-termination meeting with Marx, and that complainant asked her if she had given Marx a key when he was hired. Jones indicated she asked Marx to

return the key, and he did so.

Marx testified he became concerned about certain practices at complainant's office, including billing patients' visits with Marx as visits with complainant, complainant's absence from the office much of the time, failure to adequately supervise Marx, and leaving prescription pads for controlled substances endorsed in blank for non-licensed staff to fill in the quantity of medication. Marx stated complainant's office manager had given him a key, without restrictions as to its use, when he began his employment with complainant. Marx testified that he entered complainant's- office and made approximately one hundred copies of medical records. He denied telling Rideaux he intended to report complainant if complainant did not rehire him and give him a raise. Marx denied telling Rideaux he intended to copy complainant's records, and he also denied Rideaux ever questioned the

legality of copying the records. Marx testified that, after he copied the records, he told Rideaux and Bailey he had done so.

Section 30.02(a) of the Penal Code provides as follows:

(a) A person commits an offense if, without the effective consent of the owner, the person:

(1) enters a habitation, or a building (or any portion of a building) not then open to the public, with intent to commit a felony, theft, or an assault; or

(2) remains concealed, with intent to commit a felony, theft, or an assault, in a building or habitation; or

(3) enters a building or habitation and commits or attempts to commit a felony, theft, or an assault.

See Tex. Penal Code Ann. § 30.02(a)

(Vernon 2003). It is intent, not the character or value of what is stolen, that makes the offense of burglary complete. *Garcia v. State,* 571 S.W.2d 896, 898 (Tex. Crim. App. 1978). Furthermore, burglary "does not expressly require an intent to steal property from within the burglarized premises and . ..." *Robles v. State,* 664 S.W.2d 91, 94 (Tex. Crim. App. 1984). In *Robles,* the Court of Civil Appeals held :'it is only necessary to prove that the unlawful entry was made for the purpose of furthering commission of the intended theft." *Id.* As fact finder, it was the exclusive province of the trial court to assess the credibility of witnesses and the weight to be given their testimony, and to resolve any conflicts in the evidence. See *Winkley,* 123 S.W.3d at *711; see also Cain,* 958 S.W.2d at 408-409; *see also Joseph,* 897 S.W.2d at 376.

The complainant testified he had terminated Marx on the date of the offense, and Marx did not have

permission to be in complainant's office. Marx admitted he entered complainant's office and made approximately one hundred copies of medical records. He testified he used his own copy paper. Complainant testified Marx informed him of the copies and attempted to blackmail him.

Viewing the record in the light most favorable to the court's determination, the evidence is legally sufficient to support the fact finder's determination that Marx entered the building without the effective consent of the owner to obtain copies of the records. The court could have concluded the intent was not to report any billing infraction to proper authorities, but to force complainant to continue paying Marx money to avoid his reporting of the records, and that the entry into the building and taking of the records was without the owner's consent. Furthermore, a neutral review of the entire record does not demonstrate the proof of guilt is so obviously weak as to

undermine confidence in the fact finder's determination, nor does it demonstrate that the proof of guilt is greatly outweighed by contrary proof. The evidence is factually sufficient to support the verdict. Marx's first issue is overruled.
Assistance of Counsel

To prevail on a claim of ineffective assistance of counsel, appellant must satisfy a two-pronged test:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674

(1984); *see also Hernandez v. State,* 726 S.W.2d 53, 57 (Tex. Crirn. App. 1986). Texas courts have held that Strick/and requires appellant to show a- reasonable, probability that, but for his counsel's errors, the outcome would have been different. *See Bone v. State,* 77 S.W.3d 828, 833 (Tex. Crim. App. 2002). "Appellate review of defense counsel's representation is highly deferential and presumes that counsel's actions fell within the wide range of reasonable and professional assistance." *Id.* Appellant must prove there was no plausible professional reason for specific acts or omissions of his counsel. *Id,* at 836. Furthermore, "[a]ny allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness." *Thompson v. State,* 9 S.W.3d 808, 813 (Tex. Crim. App. 1999) (citing *McFar/and V. State,* 928 S.W.2d 482, 500 (Tex. Crim. App. 1996)). The mere fact that another attorney might have tried the case

differently does not support a finding of ineffective
assistance of counsel. *See Hawkins v. State, 660 S.W.2d 65, 75 (Tex. Crim. App.*
1983).

Marx argues his counsel was ineffective when counsel convinced Marx to waive his right to jury trial. Marx's counsel stated in his affidavit in support of Marx's motion for new trial that "This was not a trial tactic by me, but I made this recommendation because I felt uncomfortable trying this matter to a jury. If it were not for me feeling uncomfortable, Mr. Marx would not have waived his right to a trial by jury." The record reflects Marx made a voluntary decision to waive a jury trial though he knew the reason for his attorney's advice. Nevertheless, assuming without deciding that Marx's counsel fell below professional norms by advising Marx to waive his right to jury trial because counsel felt

"uncomfortable," Marx has not shown that, but for his choice of the judge as fact finder, the result would have been different. *See Strick/and, 466 U.S.* at 687.

Marx also argues his counsel had "no real understanding" of how to present what he calls a "whistle blower defense" to the trial court. However, Marx does not point to any specific acts or omissions of his counsel which fell below professional norms, nor does he point to any specific evidence which would have been admitted but for his counsel's alleged ineffectiveness. Rather, Marx makes general accusations of ineffectiveness. Any allegations of ineffectiveness must be firmly grounded in the record, and the record must affirmatively demonstrate counsel's alleged ineffectiveness. *See Thompson, 9* S.W.3d at 813. In this case, the record does not demonstrate that counsel was ineffective. Marx has failed to meet his

burden under Strickland. Marx's second issue is overruled.

In his final issue, Marx contends the trial court abused its discretion when it failed to grant a continuance based upon the medical emergency of Marx's co-counsel. Approximately one month after entering an appearance on behalf of Marx, counsel requested a continuance based upon the medical emergency of co-counsel. The documents filed in support of counsel's motion for continuance indicated co-counsel was to be responsible for "presentation and arguments of facts to the jury," while counsel was to be responsible for presentation and argument of legal issues. Also among the supporting documents was a letter from co-counsel's physician, which stated co-counsel "currently has a serious medical condition that will require surgery, likely this week, and he will be unable to participate in any court proceedings from [dates given]."

The supporting documents also stated "[e]videntiary and interview information for the central witnesses" were locked in co-counsel's office, and possibly could not be promptly accessed. The appearance of co-counsel was filed by counsel as "Attorney in Charge for Marx."

The decision whether to grant or to deny a continuance is within the sound discretion of the trial *court. See Janecka v, State, 937 S.W.2d 456,* 468 (Tex. Crim. App. 1996); *see also Her'andez v. State, 643* S.W.2d *397, 399* (Tex. Crim. App. *1982).* An appellate court may reverse the trial court's decision only for abuse of discretion. *Hernandez, 643* S.W.2d at *399.* The trial court was in the best position to determine whether further delay was warranted under the circumstances. To prevail, Marx must demonstrate that he was prejudiced by inadequate time. *Duhamel v. State, 717* S.W.2d 80, 83 (Tex. Crim. App. 1986). On this record Marx has not

shown how he waE prejudiced by the denial of the motion for continuance. Marx's third issue is overruled.

The judgment of the trial court is affirmed. AFFIRMED.
PER CURIAM
Submitted on October 21, 2004
Opinion , Delivered December 22, 2004
Do Not Publish
Before McKeithen, C.J., Burgess and Gaultney, JJ.

No. 9-/0023SCR
IN THE COURT OF APPEALS
FOR THE NINTH SUPREME JUDICIAL DISTRICT
OF TEXAS, AT BEAUMONT
BRUCE ALLEN MARX
Appellant,
V.
THE STATE OF TEXAS,
Appellee,

FROM THE DISTRICT COURT OF JEFFERSON COUNTY
252ND JUDICIAL DISTRICT:
CAUSE NO. 84732
THE HONORABLE LAYNE WALKER, JUDGE PRESIDING

APPELLANT'S BRIEF

Submitted by:CHRISTINE R. ZETO
Attorney at Law

On the 23rd day of May, 2003 the Appellant filed his Motion for New Trial. (CR.IV, pp.630-634). The Motion for New Trial was overruled by operation of law on the 12TH day of July, 2003. It is from this disposition that Appellant Appeals.

POINTS OF ARGUMENT

POINT 1: THE EVIDENCE WAS LEGALLY AND FACTUALLY INSUFFICIENT TO SUPPORT THE CONVICTION.

POINT2 : THE APPELLANT WAS NOT GRANTED EFFECTIVE ASSISTANCE OF COUNSEL AS PROVIDED FOR IN THE 6TH AMENDMENT OF THE U.S. CONSTITUTION.

POINT 3: THE TRIAL COURT ERRED IN FAILING TO GRANT THE MOTION FOR CONTINUANCE BASED ON THE MEDICAL EMERGENCY OF THE APPELLANT'S LEAD COUNSEL.

SUMMARY OF THE ARGUMENT

Appellant complains of three things upon appeal. The first being that the evidence was legally and factually insufficient to find him guilty of Burglary of a Building. This Court must decide whether the evidence was so inconsistent such that no fact finder could have found the Appellant guilty beyond a reasonable doubt.

POINT I. THE TRIAL COURT ERRED IN FAILING TO GRANT THE MOTION FOR CONTINUANCE BASED ON THE MEDICAL EMERGENCY OF THE APPELLANTS LEAD COUNSEL.

Robert Wood entered an appearance for Appellant on February 26, 2003. (CR. IV, pp 555-556). The Appellant filed a motion for continuance on March 25, 2003. (CR. IV, pp. 591-598). Robert Woods found out on March 19, 2003 that he was diagnosed with a large tumor in the area of his kidneys and would have to undergo emergency surgery on March 26, 2003. (CR. IV, pp. 591-598).

Mr. Wood was retained to do the actual trying of the case and presentation of facts to the jury. (CR. IV, pp. 591-598). Mr. Wood had been associated with the case because of his expertise in the area of whistle blower cases. (CR. IV, pp. 591-598). Mr. Lawrence did not feel competent to handle the trying of such a complicated case to a jury which was why Mr. Wood was associated. (CR. IV, pp. 591-598).

Mr. Lawrence was not prepared to handle the cross-examination of the witnesses and the presentation of evidence. (CR. IV, pp. 591-598). The files needed to prepare the case were locked in the Law Offices of Robert Wood. (CR. IV, pp. 591-598). The trial court denied the motion for continuance on March 25, 2003. (CR. IV, p. 594). It was only after that denial that the Appellant filed a waiver of trial by jury. (CR. IV, p. 599).

Courts have long determined that the determination to grant or deny a continuance is generally within the sound discretion of court. *Collier v. Poe,* 732

S.W.2d 332 (Tex. Crim. App. 1987), appeal dismissed 108 S.Ct. 51, 484 U.S. 805, 98 L.Ed.2d 15. There must therefore, be a clear abuse of discretion shown to reverse a trial court's ruling. Just such an abuse of discretion exists in the present case. Mr. Wood had been retained prior to trial and had been ready to present the case for trial up until about 12 days before trial. There exists no evidence in the record to contradict the nature of Mr. Wood's employment.

The Court of Criminal Appeals determined that a Defendant was not harmed by overruling a motion for continuance where there was no showing that surgery would be a hindrance to effective representation. *Jiminez V. State, 717* S.W.2d 1(Tex. Crim. App. 1986). In the present case, it was clearly shown in the motion and affidavits how Mr. Marx would be harmed. Just to list a few of the ways Mr. Marx was harmed: 1) Mr. Wood had been retained to present evidence to the jury; 2) Mr. Wood was the attorney prepared to present the evidence to the jury not Mr.

Lawrence; 3) the files were in the office of Robert Wood indicating that Mr. Lawrence would not have been prepared for the presentation of evidence; 4) Mr. Lawrence went on record stating that he was not competent to handle a jury trial of this complicated nature; and 5) Mr. Marx felt compelled to sign a waiver of trial by jury due to Mr. Lawrence's lack of competence with jury trials.

The trial court's ruling effectively denied the Appellant his right to counsel of his own choosing. The Appellant was not asking for a great deal of time. It was not of such an unreasonable nature. Considering the nature of the surgery, it was reasonable to ask for the 90 day extension for trial. The case had been pending for almost two years without the State rushing to trial. It was simply a clear abuse of discretion to deny this motion for continuance. This forced the Appellant to proceed with incompetent, unprepared counsel.

The only way to rectify this error is to reverse this matter and send it back for a new trial.

NO. 84732
STATE OF TEXAS vs
BRUCE ALLEN MARX
IN THE DISTRICT COURT
252ND JUDICIAL DISTRICT

AFFIDAVIT IN SUPPORT OF MOTION FOR NEW TRIAL

STATE OF TEXAS §
§
COUNTY OF JEFFERSON §

On this date, Jack Lawrence was placed under oath and stated the following after being duly sworn:

"My name is Jack Lawrence. I am over the age of eighteen, and I am competent to make this affidavit.

"At trial, I represented Bruce Allen Marx, convicted of the offense of burglary of a building on April 28, 2003. At the onset of trial, objected on Brady grounds, then stated that I renewed my objections on Sixth Amendment grounds made in chambers when Judge Layne Walker ruled on the last defense Motion for a

Continuance shortly before trial.

"This requires some elaboration of this objection as it was made in chambers. At the time of this trial, I had no first chair experience with jury trials, and as I further explained *to* the court in chambers, only three jury trials as second chair, either civil or criminal. I had early on, associated Robert Woods, a friend of mine whom I had seen try jury cases before, to try Mr. Marx's case. I explained to the court that a letter I furnished to the court written on Mr. Wood's letterhead and attached to the motion for continuance, set forth the working relationship between counsel for the defense. I was to handle all pre-trial issues and argument of legal issues, and Mr. Wood was to handle all factual argument.

BRUCE ALLEN MARX
JEFFERSON COUNTY, TEXAS

"Judge Lupe Flores, with whom I was formerly associated in private

practice, was present during the court's in chambers hearing on this issue. I am not aware whether this hearing was recorded or not. "At any rate, I argued that my client had requested a jury trial, and that I was not experienced with juries. I had therefore brought in Mr. Wood, who does jury trials, and I was only supposed to do motions and pre-trial hearings, as well as a few incidental witnesses, such as business records witnesses, the impeachment of Jo Lynn Bailey, and possibly, the presentation of Tamara Hebert. This should not be my first jury trial because it had many complex issues. (Although I did not then elaborate, this included a complicated proof which involved arguing immunity based on Mr. Marx's actions as a "whistle blower," some of which could be construed as incriminatory. I was totally unfamiliar with salvaging potentially embarrassing issues before juries. I also frequently read what f need to say and appear very mechanical and/or cluttered.

I also do not project my voice well.) "I was greeted with the expected statements of "There's always a first one!" etc. Mr. Knauth then argued that Mr. Wood was never there, that l was then one handling the case, because I was always there. This was incorrect. Mr. Wood, who practices in Woodville, Texas had been present for all hearings of record. I simply re-iterated that "l was to handle all pre-trial hearings." (Thus far, that's all there were.) "At that time, my client's had paid Mr. Wood $2000.00 to try the case. I then argued that my clients had a Sixth Amendment right to trial by counsel of choice where retained, stating I believed i had seen U.S. Supreme Court dicta to the effect that this was different from the issue of an indigent client's right to counsel of choice. Mr. Wood still wanted to try this case after he recovered from emergency surgery.

"Judge Layne Walker, seemingly turning much on Mr. Knauth's statement that Mr. Wood was "never" present,

overruled the Motion for Continuance, also reciting that it was the fourth such motion. I recall that the entire defense team had arrived in court for the docketed setting in Fall, 2002, and announced "ready" and were reset. Also, I do not recall any previous case setting that was continued, as opposed to being reset, if that is a distinction that is worthwhile.

"I was somewhat stunned by the ruling, but immediately contacted Mr. Marx and explained the alternatives, and suggested he waive a trial by jury. I made this recommendation due to my belief that I was ill prepared to try this case to a jury. I do not believe that Mr. Marx would have waived his right to a trial by jury if I had not made this recommendation. I know that my client wanted a jury trial and would not have waived this right if I had not recommended it. This was not a trial tactic by me, but I made this recommendation because I felt uncomfortable trying this matter to a

jury. If it were not for me feeling uncomfortable, Mr. Marx would not have waived his right to a trial by jury.

"I then had to obtain witness files back from Mr. Wood since, during the previous week, we had divided up the witness files and many of the files were still in Woodville, Texas. When they finally arrived, I had to take my practice down for eight straight days before trial to devote myself to nothing but preparation of Mr. Marx's case. By the end of the trial, I had pink-eye in my right eye, which always indicated too much constrained reading and eye-strain.

"I began speaking to Darren Erwin on the recommendation of his former divorce attorney, Terry Doyle, concerning the witness, Jolynn Bailey, who was Darren Erwin's former mother-in-law. Mr. Erwin informed me that at all times he would try to help, but that he did not want to testify because he feared retaliation, both mental and physical, from Jolynn Bailey and her husband, Don Bailey. I initially sought to

learn what I could because I knew from an early interview with Triangle AIDS Network (TAN) Director, Jim Bolton, that the source of his information about Mr. Marx having committed a crime at Dr. Kaza's office was Jolynn Bailey, and because Jolynn Bailey had used wording with Mr. Erwin only Dr. Kaza had used with the police. This indicated to me a possible Maine v. Moulton issue or a suppression hearing, particularly in light of the fact that Don Bailey was a Beaumont Police Department Detective at the time my client undertook to report Dr. Kaza's alleged Medicaid violations around May 16, 2001.

"Jolynn Bailey had already begun a vendetta to try to get Mr. Marx fired, among other things by falsely alleging Mr. Marx had smoked marijuana while at work TAN. Mr. Erwin told me that she had stated in his presence that that allegation was false. Mr. Erwin told me that she did this because she believed Mr. Marx was about to report her. I also learned that Jolynn Bailey had begun

vendettas against Mr. Erwin, against another son-inlaw Riley, possibly against a neighbor, and that Groves Police Department had reports of all of it.

"Ms. Bailey's vendetta against Darren Erwin involved many calls to the CPS against him in an apparent effort to gain control of her grandson. These efforts so closely resembled what Mr. Marx's first wife had attempted to do to him - according to Mr. Erwin, with assistance from Jolynn Bailey, that I saw a real pattern of alleging unfounded criminal acts emerging.

"I felt this was now both Moulton material and impeachment evidence. I began talking to Mr. Erwin at least as early September 27, 2002, and initially thought I could use his affidavit in a suppression hearing, (as per the Court of Criminal Appeals' Bishop decision). Judge Walker disallowed such an affidavit at a pre-trial conference, so I had to subpoena Mr. Erwin, as part of my duty to my client, particularly when I learned there would be no suppression

hearing, because there would be no jury. "Because I could not record Mr. Erwin, due to a State Bar Ethics opinion, I took copious notes of our phone conversations, and tried to stick to his verbatim statement as much as possible. Therefore, these attached handwritten notes are much as he stated to me over the phone. From these notes I developed a typewritten bill of exceptions which I attempted to submit to the court, but the court would not allow me to submit. "During the course of my representation of Mr. Marx, I undertook an investigation of his charges against Dr. Kaza concerning fraudulent billing practices, and other evidence that Dr. Kaza abused his ability to prescribe certain pharmaceuticals, including controlled substances. "I found a great deal of information implicating Dr. Kaza in previous Medicaid abuse, dating back to his loss of 6 Medicaid provider numbers in the Detroit, Michigan, area circa 1987. I was also able to document that he lied when he said he had never had a prior

provider number when he applied for a provider number in Texas in the mid 1990's. Due to the fact that he also applied for a new Medicare number at the same time, I became particularly suspicious. Because he had signed the statements, I hoped to use them for impeachment, since Kyles v. Whitley seemed to tacitly approve impeachment related to ulterior motives. "Among 4 things Mr. Marx had reported Dr. Kaza for, one was for leaving endorsed knew well of Dr. Kaza's abuses which were the same as, or similar to, these reported by Mr. Marx. I felt that, because Texas Human Resources Code § 36.004, and § 48.154 had been noticed by the defense repeatedly, that we should have at least been entitled to make a record on this. Not only was it admissible as impeachment evidence of Dr. Kaza, and his motives of bringing charges, but it also seemed admissible under Rule 404(b), T.R.E., or the doctrine of chances, when coupled with the testimony of another disinterested office manager

from Dr. Kaza's, who, like Ms. Hebert, did not know Mr. Marx personally, Ms. Dana Morris.

"Before discussing Ms. Morris' testimony, had Judge Walker permitted her to be called as a witness, I want to elaborate briefly on 2 things which have continued to perplex me about the trial of this case.

"First, when Judge Giblin heard pre-trial motions in the Marx case, he made very clear that the issue of immunity raised by Texas Human Resources Code §36.004, would be for the jury to decide, implicitly meaning that evidence on that issue would be heard and made a part of the record.

"Judge Walker stated in a counsel conference in chambers at the end of February 2003, on the day new carpet was laid in Judge Walker's office, that the was going to follow all of Judge Giblin's rulings. However, on the day of trial, one of the defense motions he ruled against would have allowed presentation of an immunity defense based on

Statutes including Texas Human Resources Code § 36.004 and § 48.154(a) and the Stone v. State case.

"We were not only not allowed to present evidence on this immunity defense, but we also were denied a record on it via witnesses like Tamara Hebert and Dana Morris, and the several question and answer bills of exceptions I requested, but was not allowed to make.

"Secondly, the prosecutor, Mr. Knauth, stipulated to admit Mr. Marx's Application for Probation and affidavit as the sole exhibit and only evidence presented during the sentencing phase of the trial. However, he came back and asked for a maximum sentence of 2 years at the sentencing hearing despite the Pre-Sentence Investigation Report revealing Mr. Marx had a spotless record. Possibly as a result, Judge Walker gave 60 days in jail as up-front time.

"Judge Walker also rejected another of Dr. Kaza's office managers whom I subpoenaed, Dana Morris. Attached to

this affidavit is an official court record from Dana Morris v. Sudheer Kaza, No. E-158,382 (Jefferson County, Texas), which is the report of Dana Morris' therapist, Dr. Priscilla Ray, concerning revelations by Ms. Morris about Dr. Kaza's conduct. It is a Forensic Psychiatric Examination of Ms. Morris, conducted on January 20, 1999, and filed on October 21, 1999.

"Mr. Ken Lewis, who had represented Ms. Morris in her suit against Dr. Kaza, which largely involved Dr. Kaza's abusive sexual affair with her, told me Ms. Morris could testify on the issues we needed her for, i.e. the matters Mr. Marx reported Dr. Kaza for, if Judge Giblin would rule that their confidentiality agreement which resulted from Ms. Morris' settlement with Dr. Kaza, did not cover what we needed from Ms. Morris as a witness. In fact, Mr. Lewis even left his file from the Morris v. Kaza case with Judge Giblin for him to examine, to determine if any of the documents in the file were

relevant. (In other words, whether the information I wanted Ms. Morris to testify to, e.g. abusive prescription practices by Dr. Kaza via Vidor drug stores, was covered by the confidentiality agreement.)

"The Morris - Kaza file was still in chambers when Judge Walker took office, but people in his office were unaware of it. A call by me to Judge Giblin allowed me to tell the court where to look for the file, although I never saw it.

"Prior to trial, Judge Walker also tried to pass this decision back to Mr. Lewis, saying Mr. Lewis could decide whether or not the confidentiality agreement applied.

"Finally, on the second day of trial, I explained that I had spoken to Ms. Morris and that she would testify if Judge Walker would rule she could. Judge Walker ruled against her testifying because he had already ruled he was not hearing any evidence on the immunity issue.

"In the attached medical report, one will see that Dr. Kaza engaged in fraudulent billing practices by billing Ms. Morris' insurance company for therapy while he was having sex with Ms. Morris on the floor of his office. Dr. Kaza was billing Ms. Morris's insurance company for other therapy sessions which never existed. Dr. Kaza was using Ms. Morris to obtain prescription medicine for his own use which he did not want in his name. This medicine was a type of "speed pill". Dr. Kaza was prescribing speed and other pills for Ms. Morris, as long as they didn't interfere with her sexual appetite.

"Ms. Morris would also have testified that her husband's insurance company was billed for doctor visits with her husband, while Mr. Morris never saw Dr. Kaza. There were bills using her son, Cody's, Social Security Number, for services which were never rendered.

"It became evident in my questioning of Karen Jones that, as my client suspected, although Mr. Marx saw

most of Dr. Kaza's Medicaid patients when Dr. Kaza was not even in the building, these patients were being billed for a doctor visit with Medicaid, and not for a visit with a Physician's Assistant.

"All such visits with Mr. Marx had to be billed to Medicaid coded with either + PA or + AN modifiers. Judging from Ms. Jones' responses, they were not. This is a Medicaid violation, although only a civil one. But if, for example, Mr. Marx only saw these patients for 15 minutes each, as was the usual case, but Medicaid was billed for 1/2 hour or 1 hour sessions, then a more serious medicaid violation, such as was suspected by the patient, Chris W., would have occurred. Dr. Kaza never tendered the billing records for Medicaid patients seen by Mr. Marx which I had subpoenaed, to me in court.

"The psychiatric report of Dana Morris is admissible to show fraudulent billing practices by Dr. Kaza because it is an official record and is certified as

such, and is admissible under the doctrine of chances, and under the Hilmon exception to the hearsay evidence rule, or it's Texas equivalent.

"The entire time of the trial , I was frequently cut off while speaking and I often felt I could not get in a word edgewise. I also requested the court to review the records provided from the medical board on Dr. Kaza. The court refused to allow these records to be presented or to give the defense a copy of them or to allow the defense to inspect them. These documents were documents that proved that Mr. Marx was indeed a "whistle blower" and should be immune from prosecution, as well as show that nothing had been taken from Dr. Kaza's office other than photocopies created after Mr. Marx's admittance into the building. This evidence was exculpatory and required to be given to the defense under Brady v. Maryland.

"Additionally, Nathan Wright, as the Chairman of the Board of Triangle AIDS Network (TAN), in response to my

subpoena *duces tecum*, brought some letters written by JoLynn Bailey and Malena Rideaux to court which were typed. However, during my only meeting with Jim Bolton, the Executive Director of TAN, on or about April 10, 2002. I was shown at least 3 letters in handwriting by Ms. Bailey and Ms. Rideaux, which were not typed, and which were much more detailed in their disparagement of Mr. Marx. To me, the effort to cause him to lose his job at TAN being orchestrated by Ms. Rideaux and JoLynn Bailey was much more manifest in the handwritten letters. (Bias against Mr. Marx was more evident.) Those letters were never produced for the court.

"Finally just as I promised Darren Erwin at trial, I would like to request that his testimony and statements are sealed after all appeals are final in this case. Additionally, I am requesting the Grievance letters by JoLynn Bailey against me, which were denied by the State Bar of Texas be sealed presently, since Judge Walker never distributed

them to counsel, and ruled against their release. (Statute requires they not be released.)

"I hereby attest that the documents attached hereto as Exhibit A are certified copies of documents filed in Cause No. E-158,382, Dana Morris vs. Sudheer Kaza, M.D. I also hereby attest that the documents attached hereto as Exhibit B are true and correct copies of the notes I made of my conversations with Darren Erwin.

"This affidavit is being filed in support of the Defendant's Motion for New Trial.

"Further Affiant says naught."

Sworn to and subscribed before me on June 26, 2003.

(signed)

Jack Lawrence, Affiant

CHRYSTAL MURPHY
Notary Public State of Texas
Commission Expires May 3, 2006

NO. 94732
STATE OF TEXAS vs.
BRUCE ALLEN MARX
IN THE DISTRICT COURT
252nd JUDICIAL DISTRICT
JEFFERSON COUNTY, TEXAS

AFFIDAVIT IN SUPPORT OF MOTION FOR NEW TRIAL

STATE OF TEXAS §
§
COUNTY OF JEFFERSON §

On this data, Robert Wood was placed under oath and stated the following after being duly sworn:

"My name is Robert Wood, (am over the age of eighteen, and I am competent to make this affidavit.

"Bruce Allen Marx was convicted of with the offense of burglary of a building on April 28, 2043.

"I was retained by Bruce Allen Marx to represent him in this matter *early* in 2002. I was prepared to sit first chair on this trial. In fact, we had announced ready on at least one other occasion and were present to try this case, but the matter was reset. This case was set for trial on March 31, 2003. Approximately one week before this case was set for trial, f found out I had to undergo surgery for cancer. I was undergoing surgery on April 9, 2003. There was never any question between the client or co-counsel who would try this case. I was set and prepared to try this matter. I would have been ready to try this matter once I had my health taken care of. In fact, I have since resumed working.

"This affidavit is being feed in support of the Defendant's Motion for New Trial.

"Further Affiant says naught.

(signed)
Robert Wood, Affiant
Sworn to and subscribed before me on

27th day of June 2003
(signed)
Jackie Skinner
Notary Public

No. 84,732
THE STATE Of TEXAS vs.
BRUCE ALLEN MARX
IN THE DISTRICT COURT OF
JEFFERSON COUNTY, TEXAS
252ND JUDICIAL DISTRICT

ORDER

On this the 25th day of March, 2003, the court heard the application of Robert Wood and Jack Lawrence, attorneys for the Defendant, for continuance of the above-entitled and numbered cause because of emergency major surgery which will be performed on Robert Wood on or about March 26, 2003, and the Court is of the opinion that said Motion is hereby:

/GRANTED X/DENIED

Signed on: March 25,2003.

(signed)L. WALKER, JUDGE

No. 84,732
THE STATE Of TEXAS vs.
BRUCE ALLEN MARX
IN THE DISTRICT COURT OF
JEFFERSON COUNTY, TEXAS
252ND JUDICIAL DISTRICT

MOTION FOR A CONTINUANCE DUE TO MEDICAL EMERGENCY

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, BRUCE ALLEN MARX, Defendant in the above-entitled and numbered cause, and files this his Second Motion for A Continuance, and as reasonable grounds therefor, would respectfully show the Court as follows:

Defendant is charged by indictment with the offense of burglary with intent to commit theft, which allegedly occurred on or about May 16, 2001.

II.

The cause has been set for trial before the 252nd District Court of Jefferson County, Texas, on March 31, 2003, at 1:30 p.m.

III

Good cause is shown for continuing this trial as follows:

The attorney hired to do the actual trial of facts to the jury, and the cross-examination of all the State's witnesses but one who had previously been subpoenaed by the defense, as well as the presentation of the main defense witnesses on direct, is scheduled for emergency surgery on Wednesday, March 26, 2003. This attorney is Robert Wood, of Woodville, Texas. Since March 19, 2003, he has been tentatively diagnosed with cancer, a CT scan having revealed a tumor the size of a baseball which has affixed itself in the area of his kidneys; more

specifically, Mr. Wood has a large renal tumor growing on a kidney, and surgery could necessitate removal of the kidney. Mr. Wood's treating physician is Steven Socher, 2900 North, Beaumont, Texas, telephone number: 899-9111. Mr. Wood is presently in Room 5103 of St. Elizabeth's Hospital, Beaumont, Texas(892-7171). However, he may be taken to M_ D. Anderson in Houston, Texas, at some point. Following his scheduled surgery, (°1r. Wood may not be able to return to the practice of law until some uncertain future date, depending in part on what is found during surgery- At a minimum, he may not receive medical approval to return to work for at least three weeks.

(FILED) 3/25/2003

The attached letter dated February 8, 2002, states the agreement which Mr. Wood and Mr. Lawrence have as co-counsel in this case. Mr. Lawrence is to handle legal issues, and Mr. Wood is to handle the "presentation and argument of facts to the jury." Simply put, trial was to occur around this framework. (The February 8th letter is attached as Exhibit A.)

Although Mr. Lawrence is nominally designated as lead counsel, his decision to bring Mr. Wood in to try the jury portions of this very complicated case was because this case involves issues of both criminal law and labor law ,particularly, whistleblower and retaliatory discharge law, in which Mr. Wood has based most of his practice for the last 23 years. Mr. Wood has also tried many more criminal cases to a jury than Mr. Lawrence. Mr.

Lawrence has no labor law experience or background; Mr. Lawrence also has no first chair jury trial experience, and has served as a silent second chair in only 3 jury trials, one of which was civil. The bulk of Mr. Lawrence's several trials have been non-jury.

In sum, Mr. Wood is a prominent jury trial lawyer, and Defendant has requested, and paid for, a jury trial by counsel of his choice.
There is a further problem. Evidentiary and interview information for the central witnesses is contained in individual witness files, many of which are presently locked up in Mr. Wood's law office in Woodville, Texas.

Like Mr. Lawrence, Mr. Wood is a solo practitioner, and his wife, Sue Wood, may need to be at his side in the coming days. It is not: known how or when the files for the Marx

case which are locked inside Mr. Wood's closed law office can be obtained. This fact alone places any attorney at a handicap in trying to throw together a framework of defense, particularly without Mr. Wood being currently more available to explain how he planned to proceed. Also, the State has still not filed its witness list.

A letter from Mr. Wood's doctor describing his condition and expected recovery period is attached as Defendant's Exhibit D.

Due to this sudden illness of trial counsel, Defendant cannot safely go to trial on the above-mentioned date of March 31, 2003.

IV.

This is Defendant's third written motion for continuance the case was reset. Defendant will withdraw his announcement of "Ready" made on October 14, 2002.

V.

Defendant would show that a continuance until after June 30,2003, is necessary.
Respectfully Submitted
filed herein. Apparently, others were not ruled upon.

RE:: Robert Wood D.O.B. 9-11-41

To Whom May Concern:

Mr "Wood asked me to send a letter to the court regarding his medical status.
He-currently has a serious medical condition that will require surgery, likely this week,'. and he will be unable to participate in any court proceedings from 03-31-03 to 04-04-03.
If you have questions, please call me at my office.
Thank You.
Sincerely,
Steve A Socher;, M.D.

VERIFICATION AFFIDAVIT

In support of Defendant's attached Motion for A Continuance Due To Medical Emergency, the undersigned affiant, as counsel for Defendant herein, after being first duly sworn, states as follows:

I have read the above and foregoing Motion for A Continuance Due To A Medical Emergency, which is based in part on my conversations with Mr. Wood by phone from his hospital room at St. Elizabeth's Hospital, now Christus St. Elizabeth's Hospital, in Beaumont, Texas, and it is true and correct to the best of my knowledge.

I would add that the defense has not been served with a witness list by the State. Also, if I was called upon by the Court to present the entire case, my reduced preparation due to my limited role under my agreement

with Mr. Wood, would still require extra time to enable me to prepare an adequate defense, and I do not now have the case-materials which are locked in Mr. Wood's office in Woodville, Texas.

This continuance is not sought solely for purposes of delay but so that justice may be done.

Mr. Wood's sudden need for emergency major surgery has left the defense in disarray, but he will be able to resume his duties after he has had a chance to recover.
(signed) Jack Lawrence
SWORN AND SUBSCRIBED TO before me, the undersigned official seal "
Public), to which witness my hand and
Notary Public in and for the State of Texas
(signed)